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## Comment

### No More Times Tables: Risk Multipliers in Attorneys' Fee Awards After *In Re Bolar Pharmaceutical Co.*

*Peter-Christian Olivo*

"The issue of attorneys' fees, from the Congress to the courts, never rests."

Kenneth W. Starr<sup>1</sup>

Myron Gackebach and his fellow plaintiffs commenced a class action against Bolar Pharmaceutical Company, alleging that Bolar and some of its officers and directors fraudulently obtained United States Food and Drug Administration approval to manufacture and distribute generic drugs.<sup>2</sup> Bolar settled, and as part of the settlement agreement created a common fund of nearly thirty-one million dollars, part of which would pay plaintiffs' attorneys' fees. Lead counsel Daniel L. Berger applied for an award of fees on behalf of the twenty-four law firms who represented the class.<sup>3</sup> The district court awarded fees of \$2,351,694.40, which included a 1.6 risk multiplier to account for the possibility that plaintiffs would lose, and consequently, their attorneys working on a contingent fee basis would receive nothing.<sup>4</sup> Gackebach contended that this risk

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1. Kenneth W. Starr, *The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189, 230 (1986).

2. *In re Bolar Pharmaceutical Co.*, Sec. Litig., 800 F. Supp. 1091, 1092 (E.D.N.Y. 1992).

3. *Id.* A common fund is the settlement fund the defendant deposits with the court for release of liability. See generally 2 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11 (2d ed. 1985) (discussing settlement of class actions). Under the common fund doctrine, an attorney who creates a benefit for the members of the class is entitled to reasonable compensation from the fund. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975) (summarizing the common fund doctrine). For a detailed explanation of the common fund doctrine, see *infra* notes 17-21 and accompanying text.

4. *Bolar*, 800 F. Supp. at 1092. The court utilized a risk enhancement factor of 1.6. *Id.* A risk enhancement factor is a number representing the risk of not being paid that the attorney faces at the inception of the case. See *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102,

enhancement was improper and appealed the fee award to the Second Circuit.<sup>5</sup> The Court of Appeals remanded "for specific findings" on allowing the risk enhancement multiplier, suggesting that the district court might postpone consideration until the Supreme Court decided a similar case involving risk multipliers.<sup>6</sup> The district court obliged and after the Supreme Court's decision, subsequently reevaluated its original risk enhancer, reducing the fee award by \$881,885.40.<sup>7</sup>

*In re Bolar Pharmaceutical Co.* raises the issue of whether it is appropriate to apply a risk multiplier to a common fund case. The *Bolar* district court found risk multipliers to be inappropriate in a common fund case, thus extending the Supreme Court's restriction on risk multipliers.<sup>8</sup>

This Comment argues that the *Bolar* court's rationale for prohibiting risk multipliers in the common fund context is misguided and problematic. Part I gives a brief history of attorneys' fees in the United States and traces the efforts of courts to determine reasonable attorneys' fee awards. Part II details the holding and reasoning of the *Bolar* district court's opinion. Part III critiques the *Bolar* opinion and argues that the court

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117 (3d Cir. 1976) ("*Lindy IP*") ("Under the rubric of 'the contingent nature of success' the district court should appraise the professional burden undertaken—that is, the probability or likelihood of success, viewed at the time of filing suit."). A risk enhancement factor of 1.6 signifies a 62.5% chance of success (or more accurately, a 37.5% risk of losing and thus not receiving any fee).

The risk multiplier (RM) is derived by dividing one by the percent chance of success:  $(1 / x\%) = \text{RM}$ . For example, if there is a 75% chance of success, the risk multiplier is 1.33:  $(1 / 75\%) = 1.33$ . Thus, to accurately reflect the attorney's fair market value, a court should multiply the primary lodestar by 1.33.

The basis for the risk enhancement is to compensate a plaintiff's attorney for her services as an entrepreneur who bears the risks of the litigation. John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 480 (1980).

5. *In re Bolar Pharmaceutical Co.*, Sec. Litig., 966 F.2d 731, 732 (2d Cir. 1992) (per curiam).

6. *Id.* at 733. The Second Circuit suggested that the *Bolar* court postpone further evaluation until the Supreme Court decided *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992), a statutory fee-shifting case regarding the appropriateness of risk multipliers. *Id.*

7. *In re Bolar Pharmaceutical Co.*, Sec. Litig., 800 F. Supp. 1091, 1097. (E.D.N.Y. 1992). The court originally granted \$2,351,694.40 in attorneys' fees, of which \$881,885.40 was a risk enhancement. *Id.* at 1092.

8. The Supreme Court restricted a risk enhancement in a statutory fee award case, *City of Burlington v. Dague*, not a common fund fee award as in *Bolar*. A statutory fee-shifting case is one in which Congress has explicitly provided for the award of attorneys' fees to the prevailing party. See, e.g., 42 U.S.C. § 1988 (1988) (granting reasonable attorneys' fees to prevailing parties).

incorrectly applied Supreme Court precedent by failing to recognize the purpose and effect of common fund fee awards, and the fair market value of attorney services. Finally, this Comment proposes better ways to use the risk multiplier to enhance its effectiveness, to reduce the amount of litigation surrounding its use, and ultimately to encourage attorneys to accept contingent fee, common fund cases.

## I. THE RISK MULTIPLIER IN ATTORNEYS' FEE AWARDS

### A. THE "AMERICAN RULE" AND ITS EXCEPTIONS

The "American Rule" governs most attorneys' fee situations in the United States.<sup>9</sup> Under this rule, each party is responsible for its own attorneys' fees, regardless of which side prevails.<sup>10</sup> Due to its perceived harshness,<sup>11</sup> however, there have been a number of exceptions to the American Rule, both

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9. The Supreme Court first embraced the "American Rule" in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). The *Arcambel* Court ruled that the judiciary itself would not create a general rule, absent any statute, to allow awards of attorneys' fees in federal courts. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-61 (1975) (explaining development of the American Rule and reaffirming its principles). See generally John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984) (providing a detailed historical explanation of the American Rule and the exceptions to it).

10. On an international level, the American Rule represents the exception rather than the rule. Werner Pfennigstorf, *The European Experience With Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37 (1984). In England, for example, courts customarily award attorneys' fees to the prevailing party. James D. Weiss, Note, *Nominal Damages, Nominal Victory*, Estate of *Farrar v. Cain's Improper Limit on Awards of Attorneys' Fees Under § 1988*, 76 MINN. L. REV. 1251, 1253 (1992). Attorneys' fee awards under the English system serve to ensure that the prevailing party, either plaintiff or defendant, does not pay to vindicate just legal positions. Marshall J. Breger, *Compensation Formulas For Court Awarded Attorney Fees*, 47 LAW & CONTEMP. PROBS. 249, 250 (1984).

11. Critics have argued that the "no fee shifting" system of the American Rule penalizes less affluent plaintiffs and discourages them from bringing potentially meritorious claims, thus restricting their access to the judicial process. Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 246-49 (1985); Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 298 n.22 (1990); Starr, *supra* note 1, at 192 n.16 (citing articles criticizing the American Rule); see also Weiss, *supra* note 10 at 1254.

Ironically, the American Rule was designed to increase access to the courts since, in theory, people are less hesitant to sue if they only have to pay their own fees and not pay the other party if they lose. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

judicial and legislative. Two of the most prominent exceptions are the common fund doctrine and the fee-shifting statute.<sup>12</sup>

The first major exception to the American Rule, the common fund doctrine, developed from the law of class actions.<sup>13</sup> In a class action, an individual brings suit on behalf of a large group of similarly situated individuals who cannot be practically joined.<sup>14</sup> In most class actions, the defendant makes a settlement payment to the court directly, rather than to each member of the class, in exchange for a release from further liability.<sup>15</sup> These payments constitute the "common fund."<sup>16</sup>

The Supreme Court first established the common fund doctrine in 1881.<sup>17</sup> Under the doctrine, a person who preserves, recovers, or acts as a trustee of a fund for the benefit of others may recover attorneys' fees either from the fund directly or from the other parties enjoying the benefit.<sup>18</sup> This doctrine de-

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12. While the common fund doctrine and the fee-shifting statute are the two most widely used exceptions to the American Rule, courts have fashioned other exceptions as well. For example, courts may assess attorneys' fees for the willful disobedience of a court order. *Alyeska*, 421 U.S. at 258; see also Leubsdorf, *supra* note 9, at 26 (discussing fee awards as punishment for some illegal acts). Another example occurs when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Alyeska*, 421 U.S. at 258-59; see also Weiss, *supra* note 10, at 1255 n.24 (listing recent cases in which courts have awarded fees based on the "bad-faith" exception). Courts have also upheld recovery of attorney fees pursuant to a fee clause in a contract, Leubsdorf, *supra* note 9, at 24, and awarded fees under the "private attorney general" theory to grant fees to individuals initiating litigation that vindicates important public policies. Third Circuit Task Force, *supra* note 11, at 241. Courts have also granted fees under the common benefit doctrine, which is similar to the common fund doctrine except that it creates a substantive right rather than a monetary fund. Starr, *supra* note 1, at 194.

13. See 3 NEWBERG, *supra* note 3, § 14.01 ("Fee awards unique to class actions . . . are fees that are awarded under the *common fund* theory.")

14. See 1 *id.* § 1.01.

15. See 2 *id.* § 11.11 (stating that one of the reasons for a defendant settling a class action is to buy peace from the litigation).

16. *Id.*

17. Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527 (1881). The Supreme Court further developed the common fund doctrine in Central R.R. & Bank Co. v. Pettus, 113 U.S. 116 (1885). For a comprehensive explanation of the development of the common fund doctrine, see John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597, 1601-12 (1974).

18. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975) (summarizing the rule set forth in *Greenough* and listing cases which have followed the common fund doctrine); see also *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 568 (1992) ("Having employed their professional skills to create a cornucopia for the class, the lawyers for the class were entitled under the principles of restitution to suitable compensation for their efforts.").

The common fund doctrine is an exception to the American Rule because

rives from the inherent equity power of the courts,<sup>19</sup> and "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."<sup>20</sup> Because the court has jurisdiction over the common fund, it prevents such inequity by paying the attorneys' fees out of the fund, "thus spreading fees proportionately among those benefited by the suit."<sup>21</sup>

The other major exception to the American Rule is the fee-shifting statute. Two closely related types of statutes fall under this rubric: those which explicitly award attorneys' fees to the prevailing party,<sup>22</sup> and those which lack a fee-shifting provision but under which courts have nonetheless awarded fees based on the "private attorney general" theory.<sup>23</sup> According to this theory, courts grant fee awards to individuals initiating litigation to vindicate important public policies.<sup>24</sup> Courts easily justify granting attorneys' fees under the private attorney general

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it allows the named plaintiff to wholly avoid paying his attorneys' fees, thus spreading the cost of bringing the litigation equally among the class benefitted. Starr, *supra* note 1, at 194.

19. *Alyeska*, 421 U.S. at 257.

20. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). At least one commentator has suggested that an attorney is entitled to a fee because class members are enriched at that lawyer's expense. Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656, 662 (1991) (emphasis added). Professor Silver argues that the common fund context essentially forces absent plaintiffs both to accept the benefits the fund generates and to pay the accompanying attorneys' fees. *Id.* at 663. Under a pure restitutionary theory, the absent plaintiffs need not participate because the theory disfavors forced exchanges. *Id.* at 664. Professor Silver continues, however, that restitution as interpreted in the United States encompasses the moral notion that one who enjoys the benefit of another's work without acquiring a right of enjoyment ought to pay compensation sufficient either to disgorge the gain or to ensure the producer against a loss. *Id.* at 666.

21. *Boeing*, 444 U.S. at 478; see *Alyeska*, 421 U.S. at 257.

22. See, e.g., 42 U.S.C. § 1988 (1988).

23. Third Circuit Task Force, *supra* note 11, at 241. The "private attorney general" theory originally held that Congress could enact a statute conferring authority on any non-official person to bring suit to vindicate a public interest. Starr, *supra* note 1, at 194 n.30 (quoting *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943)). This judicially constructed theory eventually extended to situations which lacked express statutory authority, ultimately applying to any situation where fee shifting was necessary to permit meaningful enforcement of protected rights. Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 666 (1974).

24. Third Circuit Task Force, *supra* note 11, at 241. In order to qualify for fees under the private attorney general theory, the litigation must, "[vindicate] a right that (1) benefits a large number of people, (2) [requires] private enforcement, and (3) [is] of societal importance." Note, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929 (1985).

theory for suits brought under civil rights statutes which lack fee-shifting provisions,<sup>25</sup> and have extended the theory to other areas as well.<sup>26</sup>

## B. EFFORTS TO DETERMINE "REASONABLE FEES": A STATE OF CONFUSION

"A request for attorney's fees should not result in a second major litigation."

Justice Powell<sup>27</sup>

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25. Weiss, *supra* note 10, at 1255; see also *id.* at 1255 n.26 (listing civil rights cases where the court used the private attorney general theory to award attorney fees absent statutory authority).

26. Comment, *supra* note 23, at 667; see, e.g., *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972).

The Supreme Court temporarily eliminated the use of the private attorney general theory, however, with its decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). In *Alyeska*, the court of appeals awarded attorneys' fees based on the private attorney general theory, finding that, *inter alia*, the Wilderness Society had acted to vindicate important statutory rights of all citizens, and a failure to grant fees would deter private parties from enforcing the laws protecting the environment. *Id.* at 245-46. The Supreme Court, while simultaneously reaffirming the American Rule, limited the granting of fees to situations where Congress explicitly indicated fee shifting was appropriate. *Id.* at 269. Justice White believed that it would be difficult "for courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former." *Id.* at 263-64. Although *Alyeska* involved an environmental statute, the Court extended its holding to all statutes lacking an express fee-shifting provision. *Id.* at 269 n.44. When interpreting fee shifting statutes, the Court has looked at the legislative history of the The Civil Rights Attorney's Fees Awards Act (42 U.S.C. § 1988 (1992)) for guidance. See, e.g., *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 713 n.1 (1987) (plurality opinion) ("[I]n awarding attorney's fees under [the Clean Air Act] the courts should follow the principles and case law governing the award of such fees under 42 U.S.C. § 1988.").

In direct response to the *Alyeska* decision, Congress enacted The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1992). See S. REP. NO. 1011, 94th Cong., 2d Sess. 1 (1976) reprinted in 1976 U.S.C.C.A.N. 5908, 5909 ("The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society* . . ."). In the Act, Congress adopted the private attorney general theory for civil rights litigation, *id.* at 5913, and through the statute, permitted courts in such cases to use their discretion and provide reasonable attorneys' fees to prevailing parties. *Id.* at 5909-10. Congress intended the fees awarded under the Act to be "adequate to attract competent counsel" but not so exorbitant as to "produce windfalls to attorneys." *Id.* at 5913. The Senate Report further states that "[i]n computing the fee, counsel for the prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" *Id.*

27. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Justice Powell continued, "Ideally, of course, litigants will settle the amount of a fee." *Id.* In prac-

In both the common fund and statutory fee-shifting contexts, the court strives to award "reasonable" attorneys' fees.<sup>28</sup> Like its distant cousin, the reasonable person,<sup>29</sup> the reasonable attorneys' fee has been the subject of a tremendous amount of litigation.<sup>30</sup> A "reasonable" fee should, in theory, compensate an attorney for the full market value of her time and effort.<sup>31</sup>

Over the years, courts developed several methods to determine reasonable fees. Prior to the early 1970s, for example, "the most common approach taken by the lower courts in setting fees was no approach at all."<sup>32</sup> When awarding attorneys' fees under fee-shifting statutes, courts often determined a reasonable fee based on their own whim, without any reliance on objective factors or recognizable methodology for this determination.<sup>33</sup>

In contrast, under the common fund doctrine, courts his-

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tice, however, requests for attorneys' fees often result in collateral litigation. In 1992, for example, 101 cases in the federal courts dealt with attorneys' fee awards. LEXIS (Genfed Library, Courts File, query (award! /5 attorney! /2 fee and "common fund" or "equitable fund" or "fee shifting statute" and date aft 1/1/92)).

28. See 42 U.S.C. § 1988 (1988) ("The court, in its discretion, may allow the prevailing party . . . a *reasonable attorney's fee* as part of the costs.") (emphasis added). Similarly, under the common fund doctrine, the attorney who recovers a common fund for the benefit of others "is entitled to a *reasonable attorney's fee* from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (emphasis added).

29. Justice Carlin once called the "ordinary man" the "problem child of the law." *Cordas v. Peerless Trans. Co.*, 27 N.Y.S. 2d 198, 199 (1941). The "ordinary man" is synonymous with the "reasonable man." See WILLIAM L. PROSSER ET AL., *TORTS* 149-74 (8th ed. 1988).

30. See *supra* note 27 (listing the approximate number of cases in 1992 dealing with the award of attorneys' fees).

31. Samuel R. Berger, *Court Awarded Attorneys' Fees: What is Reasonable?*, 126 U. PA. L. REV. 281, 315-16 (1977). Berger states that the fair market value should govern regardless of whether the court proceeds under its equity power in a common fund case or pursuant to statutory authorization. *Id.*; see also *In re Continental II. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible.").

32. See Berger, *supra* note 31, at 284. Berger cites *Canterbury v. Dick*, 385 F. Supp. 1004 (S.D. Tex. 1973) as an example of this lack of an approach. In *Dick*, the court, acting under a fee-shifting statute, simply stated, "[t]hat the court finds that \$2,750.00 is a fair and reasonable attorney's fee for legal services rendered to and for Plaintiffs by their counsel in this suit," with no reasons behind this determination. Berger, *supra* note 31, at 284 (quoting *Dick*, 385 F. Supp. at 1009).

33. See Berger, *supra* note 31, at 284 (citing an example of a random fee determination).



torically awarded fees based on a percentage of the total recovery of the fund.<sup>34</sup> While this method appeared to be more consistent than the random determinations under fee-shifting statutes, various courts' determinations of what constituted an appropriate percentage of the fund remained inconsistent.<sup>35</sup> In fact, high percentages, coupled with the large size of the common funds, created a public impression that such fee arrangements produced windfalls to attorneys.<sup>36</sup>

Concerned that the legal profession's reputation might suffer in light of courts' haphazard determinations of fee awards, the Third Circuit advocated a system mandating that fee awards be based on time spent and skill displayed, and that fee determinations reflect this approach in a clear, cognizable manner.<sup>37</sup> The Third Circuit developed such a system, known as the lodestar, in *Lindy Bros. Builders v. American Radiator & Sanitary Corp.*<sup>38</sup>

To establish the lodestar, the *Lindy* court determined the reasonable number of hours expended by the attorney and multiplied that by the "reasonable hourly rate," usually the attorney's normal billing rate.<sup>39</sup> This calculation produced a primary "lodestar" figure.<sup>40</sup> Then, to determine the ultimate

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34. See, e.g., *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885). In one of the earliest common fund doctrine decisions, the Supreme Court granted a fee of 5% of the total fund recovered for the plaintiffs. *Id.*

35. See, e.g., *Berger*, *supra* note 31, at 288 (citing 18 private antitrust cases with fee awards ranging from 5% to 67%); HERBERT B. NEWBERG, ATTORNEY FEE AWARDS § 2.31 (listing common fund fee awards ranging from 2.2% to 53.2% of total fund); *In re Workers Comp. Ins. Antitrust Litig.*, 771 F. Supp. 284, 287 n.7 (D. Minn. 1991) (listing common fund cases with fee awards from 15% to 27%).

36. See Monique Lapointe, Note, *Attorney's Fees in Common Fund Actions*, 59 FORDHAM L. REV. 843, 845 (1991).

37. *Lindy Bros. Builders v. American Radiator & Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) ("*Lindy I*") (citing Judge Wyzanski's observations in *Cherner v. Transition Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)).

38. *Id.* at 167. The court stated that the purpose of the award was to compensate the attorney for the reasonable value of services benefitting the unrepresented claimant. *Id.*

39. *Id.* The attorney's normal billing rate reflects the value of the attorney's time, which usually reflects the attorney's reputation and status. *Id.*

40. *Id.* at 168. Although in theory this may appear to be a simple formula, in practice it is very problematic. It is difficult to determine what constitutes a reasonable number of hours and what is the proper hourly rate. See, e.g., Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 FORDHAM L. REVIEW 51, 80-83 (1988) (examining the problems of billing rates and what is a reasonable number of hours for the attorney to expend); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Rec-*

value of the attorney's services, the *Lindy I* court modified the lodestar figure by two other factors.<sup>41</sup> The court first looked at the "contingent nature of success" and then considered the quality of the attorney's work.<sup>42</sup> The contingency factor addressed the risk the attorney bore in accepting the case given that, under a contingent fee arrangement, the attorney would not receive a fee unless she prevailed.<sup>43</sup> The quality of the attorney's work encompassed not only the quality of representation the judge observed, but also the "complexity and novelty of the issues" and the size of the recovery.<sup>44</sup>

The following year, the Fifth Circuit, in *Johnson v. Georgia Highway Express*,<sup>45</sup> designed another alternative to the "no approach" method, which shares many characteristics with the lodestar method. The court set forth twelve factors to consider when determining a reasonable fee.<sup>46</sup> Even with the various methods developed to determine reasonable fees, courts have

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*ommendations for Reform*, 58 U. CHI. L. REV. 1, 17 (1991) (noting that the lodestar system permits attorney opportunism by encouraging attorneys to work excessive hours, pad the bill, or to advise against settlement irrespective of the client's interest.); Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 953-54 (1992) (noting that "disagreements over hours figure in most cases" in which parties litigate fees); Lapointe, *supra* note 36, at 848-57 (explaining the problem of hours and rates and offering some judicial responses to these problems).

41. *Lindy I*, 487 F.2d at 168.

42. *Id.*

43. *Id.*; see Berger, *supra* note 31, at 324-26; Leubsdorf, *supra* note 4, at 473.

44. *Lindy I*, 487 F.2d at 168.

45. 488 F.2d 714 (5th Cir. 1974).

46. *Johnson*, 488 F.2d at 717-19. The twelve factors are:

- (1) The time and labor required.
- (2) The novelty and difficulty of the questions.
- (3) The skill requisite to perform the legal service properly.
- (4) The preclusion of other employment by the attorney due to acceptance of the case.
- (5) The customary fee.
- (6) Whether the fee is fixed or contingent.
- (7) Time limitations imposed by the client or the circumstances.
- (8) The amount involved and the results obtained.
- (9) The experience, reputation, and ability of the attorneys.
- (10) The "undesirability" of the case.
- (11) The nature and length of the professional relationship with the client.
- (12) Awards in similar cases.

*Id.* The court based these factors on the ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1991). *Id.* at 719; see also Dan B. Dobbs, *Reducing Attorneys' Fees for Partial Success: A Comment on Hensley and Blum*, 1986 WIS. L. REV. 835, 866.

yet to generate a consensus as to which method is most appropriate in the common fund context.

### C. REASONABLE FEES AND THE SUPREME COURT: WHITTILING AWAY AT *JOHNSON*

The Supreme Court has recently given its imprimatur to the primary lodestar calculation in statutory cases, calling it "the guiding light of our fee-shifting jurisprudence."<sup>47</sup> The Court has been much less definitive, however, about whether the primary lodestar figure should be modified as mandated in the second part of the *Lindy I* analysis or according to the subjective factors test of *Johnson*.<sup>48</sup> In fact, for many years, the Supreme Court advocated the use of a hybrid method of determining the fee award, incorporating the *Lindy I* lodestar calculation and modifying it based on the *Johnson* factors.<sup>49</sup>

#### 1. *Hensley* and *Blum*: Eliminating Nine *Johnson* Factors

In *Hensley v. Eckerhart*,<sup>50</sup> for example, the Court initially recognized that "[t]he most useful starting point for determining the amount of a reasonable fee" is the primary lodestar figure.<sup>51</sup> It then stated that "other considerations," namely the *Johnson* factors, may allow the district court to modify the lodestar figure.<sup>52</sup>

The Court revisited the modification issue in *Blum v. Sten-*

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47. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2641 (1992).

48. One commentator described the Court's progress in this area as a "tortuous road" and noted that "no single issue in the law of statutory attorney's fees has created more confusion for courts than the question of how and when to adjust the lodestar." Brand, *supra* note 11, at 335.

49. See Arthur J. Lachman, Note, *Attorney's Fee Contingency Enhancements: Toward a Complete Incentive to Litigate Under Federal Fee-Shifting Statutes—Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 63 WASH. L. REV. 469, 472 (1988) (describing the Court's use of the hybrid approach). This hybrid approach differs from the hybrid approach commonly used today. Under the current approach, a court calculates the enhanced lodestar and compares it to the percentage of recovery. For an example of this method, see *infra* note 127.

50. 461 U.S. 424 (1983).

51. *Id.* at 432. The Court did not use the term "lodestar" when describing what was essentially the primary lodestar calculation until its plurality decision in *City of Riverside v. Rivera*, 477 U.S. 561, 568 (1986) (citing *Hensley v. Eckerhart*, 461 U.S. at 433, and noting that this figure is "commonly referred to as the 'lodestar'"). Justice Powell, concurring in *Delta Air Lines v. August*, 450 U.S. 346, 365 n.3 (1981), cited to the *Lindy II* use of the term, thus marking the first time the Supreme Court utilized the term to describe the calculation of attorneys' fees.

52. See *Hensley*, 461 U.S. at 434 & n.9 (citing to the factors listed in *John-*

son,<sup>53</sup> holding that, for a district court to grant an upward adjustment of the primary lodestar, the fee applicant must show that "such an adjustment is necessary to the determination of a reasonable fee."<sup>54</sup> Although *Blum* clearly established that the primary lodestar was the center of the reasonable fee inquiry, it still left issues regarding the availability of certain lodestar enhancements unresolved.<sup>55</sup>

In effect, the *Blum* and *Hensley* decisions eliminated all but three of the twelve *Johnson* factors as appropriate factors to enhance the primary lodestar in statutory fee-shifting cases.<sup>56</sup> These remaining factors all related to the contingent nature of the case, or in other words, the risk the plaintiffs' at-

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son v. Georgia Highway Express 488 F.2d 714, 717-19 (5th Cir. 1974) as permissible for district court consideration).

Although the Court recognized that the primary lodestar calculation necessarily subsumes some of the *Johnson* factors, it failed to identify which factors. See *id.* The *Hensley* Court placed heavy emphasis, however, on the "results obtained" factor of the *Johnson* test, see *supra* note 46 (factor number 8), stating that the amount of success is crucial to determining the proper fee award. *Id.* at 434.

53. 465 U.S. 886 (1984).

54. *Id.* at 898. In *Blum*, the plaintiffs' attorney requested, and the district court granted, an upward enhancement of 50% based, in part, on the complexity and novelty of the issues. *Stenson v. Blum*, 512 F. Supp. 680, 685 (S.D.N.Y. 1981). The Supreme Court found that the number of hours billed presumably fully reflects the complexity and novelty of the issues factor. *Blum*, 465 U.S. at 898. The Court recognized that the special skill of the attorney may require the expenditure of fewer hours on more complex issues. It decided, however, that such skill is taken into account in a higher hourly billing rate. *Id.* The *Blum* decision thereby eliminated three of the *Johnson* factors as a basis for modifying the primary lodestar figure, namely, (2) the novelty and complexity of the issues, (3) the skill requisite to perform the legal service properly, and (9) the experience, reputation, and ability of the attorneys. *Id.* at 898-99.

55. See *Blum*, 465 U.S. at 898-99.

56. The Court subsumed factors (1) (the time and labor required) and (5) (the customary fee) in the primary lodestar; eliminated (2) (the novelty and difficulty of the questions), (3) (the skill requisite to perform the legal service properly), and (9) (the experience, reputation, and ability of the attorneys) in *Blum*, 465 U.S. at 898-907; the Court in *Hensley* accepted (8) (the amount involved and the results obtained) as a valid basis for decreased enhancement of the lodestar figure. 461 U.S. at 436. A strong argument can be made that factors (7) (time limitations imposed by the client or the circumstances), (11) (the nature and length of the professional relationship with the client), and (12) (awards in similar cases) are also unavailable as a basis for enhancing the lodestar. The *Johnson* court described factor (7) as priority work that delays other work and noted that "[t]his factor is particularly important when a new counsel is called in." 488 F.2d at 718. A court would presumably address this factor in hours the extra attorney worked multiplied by her hourly rate. Factor (11) refers to an attorney varying her fee for a certain client. *Id.* at 719. This would be accounted for in the reasonable rate charged. Moreover, factor (12)

torney incurs by accepting the case.<sup>57</sup>

## 2. *City of Burlington*: The Contingency Factor in Fee-Shifting Statutes

The Court addressed the risk multiplier issue in *City of Burlington v. Dague*.<sup>58</sup> In *City of Burlington*, the Court held

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is foreclosed as soon as the court elects to use the lodestar because the calculation is unique to each case.

Only factors (4) (the preclusion of employment by the attorney due to acceptance of the case), (6) (whether the fee is fixed or contingent), and (10) (the "undesirability" of the case) remain after *Blum* and *Hensley*. At least as far as factor (4) is concerned, the relevant inquiry should be only the preclusion of other employment due to potential conflicts inherent with the accepted case, not lost employment for which the attorney has no time.

In *Missouri v. Jenkins*, 491 U.S. 274, 282-83 (1989), the Supreme Court found that the lodestar could be enhanced for a delay in payment of the attorneys' fees, reasoning that attorneys must meet their business expenses and that enhancing the lodestar for delay is consistent with the § 1988 command of awarding reasonable attorneys' fees.

57. See *supra* note 4 (providing a detailed description of enhancement based on the contingency factor). The Supreme Court addressed the contingency issue in the *Delaware Valley* cases (*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) ("*Delaware Valley I*") and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) ("*Delaware Valley II*")), but was unable to determine whether risk of nonpayment could be used as a basis for a lodestar enhancement.

The *Delaware Valley* cases involved a citizens' council request for the Commonwealth of Pennsylvania to implement a vehicle emission inspection and maintenance program pursuant to the federal Clean Air Act. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 581 F. Supp. 1412, 1416 (E.D. Pa. 1984), *aff'd*, 762 F.2d 272 (3d Cir. 1985), *aff'd in part, rev'd in part*, 478 U.S. 546 (1986). The citizens' council succeeded in implementing the emission inspection program and requested attorneys' fees as allowed under the Clean Air Act (42 U.S.C. § 7604(d) (1988)). The district court granted the request and used a risk multiplier to enhance the lodestar, 581 F. Supp. at 1418-31, and the Third Circuit affirmed. 762 F.2d at 280-82.

The Supreme Court upheld the district court's use of the lodestar calculation; it reversed, however, the district court's enhancement for the quality of the counsel's performance and requested reargument on the appropriateness of the lodestar enhancement based on contingency. *Delaware Valley I*, 478 U.S. at 566-68. After rehearing, no majority of justices could agree to the appropriateness of contingency enhancements to the lodestar. *Delaware Valley II*, 483 U.S. 711, 728-31 (1987) (plurality opinion). Instead, in a plurality opinion, the Court decided that in the case at bar the use of a risk multiplier was in error. *Id.* The Court could not agree, however, as to the use of contingency enhancements in future fee determinations. *Id.*

For a more in-depth analysis of the *Delaware Valley* cases, see Lachman, *supra* note 49, at 475-80.

58. 112 S. Ct. 2638 (1992). In *City of Burlington*, property owners brought an action under the Solid Waste Disposal Act (42 U.S.C. § 6972 (e) (1988)) and the Clean Water Act (33 U.S.C. § 1365 (d) (1988)), alleging that the city of Burlington, Vermont operated a landfill in violation of the statutes. *Id.* at 2639.

that courts may not enhance a fee award under the federal fee-shifting statutes.<sup>59</sup> The Court believed that allowing risk enhancements in statutory fee-shifting cases in effect pays for the attorney's time in cases that she loses,<sup>60</sup> is unnecessary to the determination of a reasonable fee inherent in the lodestar analysis, and makes the setting of fees more complex and arbitrary, hence more litigable.<sup>61</sup> Moreover, *City of Burlington* signalled the end of upward enhancements based on the *Johnson* factors in statutory fee-shifting cases.<sup>62</sup> Absent any extenuating circumstances, the Court presumes the lodestar calculation without enhancement to be the reasonable fee that Congress intended under the Fees Act.<sup>63</sup>

In addressing the issue of reasonable fees, the Supreme Court dealt only with statutory fee-shifting cases and not the awarding of attorneys' fees under the common fund doctrine.<sup>64</sup> In fact, the Court, in deciding the aforementioned cases, noted a distinct difference between fee-shifting statutes and the common fund doctrine<sup>65</sup> and has yet to address whether its statu-

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The property owners prevailed, and the district court awarded attorneys' fees under the Acts, multiplying the lodestar amount by 25% to account for the contingent nature of the action. *Dague v. City of Burlington*, 732 F. Supp. 458, 472 (D. Vt. 1989), *aff'd*, 935 F.2d 1343, 1347 (2d Cir. 1991), *rev'd in part*, 112 S. Ct. 2638 (1992). The Second Circuit affirmed the award, 935 F.2d 1343, 1359-60 (2d Cir. 1991), and the Supreme Court granted certiorari to address only the propriety of the contingency enhancement. *City of Burlington v. Dague*, 112 S. Ct. 964 (1992).

59. *City of Burlington*, 112 S. Ct. at 2643-44.

60. *Id.* at 2643. The Court found that Congress did not intend the losing parties' attorneys to be paid since the Fees Act only provided for attorneys' fees to the prevailing parties. *See id.* The Court noted that "[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not." *Id.*

61. *Id.*

62. Under the analysis set forth in note 63, *supra*, all that remains from the *Johnson* factors as a basis for modifying the primary lodestar figure is factor (8) (results obtained), which the Court upheld in *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

63. *City of Burlington*, 112 S. Ct. at 2641. The Court has "established a 'strong presumption' that the lodestar represents the 'reasonable' fee [quoting *Delaware Valley I*, 478 U.S. 546, 565 (1986)], and [has] placed upon the fee applicant who seeks more than that the burden of showing that 'such an adjustment is necessary to the determination of a reasonable fee' [quoting *Blum v. Stenson*, 465 U.S. 886, 898 (1984)]." *Id.* at 2641.

64. *See id.* at 2643-44. The Court held "that enhancement for contingency is not permitted under the *fee-shifting statutes* at issue." *Id.* (emphasis added).

65. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The Court stated:

tory fee jurisprudence governs the common fund doctrine.<sup>66</sup> This silence raises serious questions as to the appropriateness of applying fee-shifting jurisprudence to the common fund context.

## II. *IN RE BOLAR PHARMACEUTICAL CO.*: APPLYING STATUTORY FEE-SHIFTING LAW TO THE COMMON FUND DOCTRINE

Unhappy with the federal district court's assessment of a 1.6 risk enhancement factor, class member Myron Gackebach appealed<sup>67</sup> the order awarding the class attorneys their fees.<sup>68</sup> Gackebach contended that the trial court abused its discretion by multiplying the lodestar figure by 1.6 to account for the risk inherent in litigating the suit.<sup>69</sup> The Second Circuit remanded

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Nor do we believe that the *number* of persons benefited is a consideration of significance in calculating fees under [42 U.S.C.] § 1988. *Unlike the calculation of attorney's fees under the "common fund doctrine,"* where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation.

*Id.* (second emphasis added).

66. Courts have generally concluded that the Supreme Court's jurisprudence regarding statutory fee-shifting cases is not applicable to the common fund doctrine. *See, e.g.,* Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768, 775 n.7 (11th Cir. 1991) (noting that *Delaware Valley*, a statutory fee-shifting case, "is not applicable to a common fund case"); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1327 (2d Cir. 1990) ("In our view, fee-shifting statutes are generally not intended to circumscribe the operation of the equitable fund doctrine."); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 234 n.2 (2d Cir. 1987) ("*Blum and Delaware Valley Citizens' Council* are statutory fee cases whereas here fees were awarded under the equitable fund doctrine. While the lodestar formula applies to both types of cases, equitable fund cases may afford courts more leeway in enhancing the lodestar, given the absence of any legislative directive.").

67. *In re Bolar Pharmaceutical Co. Sec. Litig.*, 966 F.2d 731, 732 (2d Cir. 1992) (per curiam). Gackebach also appealed the district court's refusal to certify him as a special master to handle the disbursement of the common fund and the district court's granting of \$40,000 in fees to the law firm of Abbey & Ellis. *Id.*

68. Plaintiff's attorney Daniel L. Berger was initially awarded the sum of \$2,351,694.40 for attorneys' fees on behalf of all the plaintiffs' attorneys. *Id.* This figure represented approximately 8.5% of the approximately \$31 million settlement fund. *In re Bolar Pharmaceutical Co. Sec. Litig.*, 800 F. Supp. 1091, 1092 (E.D.N.Y. 1992). The court paid attorneys at a maximum rate of \$300 per hour and paralegals at a maximum rate of \$60 per hour. *Id.* The combined hours were 7,846.3, which resulted in a lodestar calculation of \$1,465,809.00. *Id.* This was multiplied by the 1.6 risk enhancement factor for a total fee award of \$2,351,694.40. *Id.*

69. *Bolar*, 966 F.2d at 732. During the settlement hearing, Berger, on behalf of the firms representing the class, applied for an award of 25% of the

"for specific findings and a reasoned explanation," for allowing a risk enhancement multiplier.<sup>70</sup> The Court of Appeals further suggested that the district court might wish to postpone consideration of *Bolar* until the Supreme Court decided *City of Burlington v. Dague*,<sup>71</sup> so it could benefit from the Court's guidance on a similar issue.<sup>72</sup>

At the outset of its analysis, the *Bolar* district court on remand recognized that the Second Circuit typically allowed "risk multipliers in common fund cases handled on a contingency basis."<sup>73</sup> Because the Supreme Court had recently addressed the risk multiplier issue<sup>74</sup>, however, the *Bolar* court felt compelled to reexamine its prior risk multiplier of 1.6.<sup>75</sup> The district court looked at the steady trend of Supreme Court restrictions on fee enhancements in statutory fee-shifting cases<sup>76</sup> and ultimately determined that the Court's rationale underlying the ban on contingency enhancements in statutory fee-shifting cases extended to equitable fund cases.<sup>77</sup>

Although the *Bolar* district court relied heavily on Second Circuit language suggesting similarities between common fund and statutory fee-shifting cases<sup>78</sup> and on a similar decision by another lower court,<sup>79</sup> four factors ultimately persuaded the court to rescind its use of the risk multiplier in the equitable

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settlement fund. *Bolar*, 800 F. Supp. at 1092. The court rejected the percentage request and instead elected to use the lodestar method. *Id.* at 1095-97.

70. *Bolar*, 966 F.2d at 733.

71. 112 S. Ct. 2638 (1992).

72. *Bolar*, 966 F.2d at 733.

73. *Bolar*, 800 F. Supp. at 1093. The district court explained that [i]n order to ensure adequate representation to plaintiffs bringing suits that promote a desirable public policy, yet do not offer promise of great financial gain, risk multipliers were granted to "reward[ ] counsel for those successful cases in which the probability of success was slight, and yet the time invested in the case was substantial."

*Id.* (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 236 (2d Cir. 1987) ("*Agent Orange II*") (citation omitted).

74. See *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992).

75. See *supra* note 4.

76. *Bolar*, 800 F. Supp. at 1094-95.

77. *Id.* at 1095-96. In doing so, the *Bolar* court recognized that the Supreme Court has failed to address the applicability of its statutory fee-shifting jurisprudence to the common fund doctrine and expressly rejected a number of other courts' opinions that found that statutory fee-shifting law was not binding on the common fund doctrine. *Id.* at 1095 & n.6.

78. The court referred to the language of the Second Circuit in *Agent Orange II*, 818 F.2d 226 (2d Cir. 1987), yet failed to indicate exactly what that court said. *Bolar*, 800 F. Supp. at 1095-96.

79. The *Bolar* court cited *Kronfeld v. Transworld Airlines, Inc.*, 129 F.R.D. 598 (S.D.N.Y. 1990), stating that it was adopting the *Kronfeld* philoso-



fund context.<sup>80</sup> First, the *Bolar* court concluded that applying the *City of Burlington* rationale to the common fund context did not defeat the purpose of the common fund doctrine.<sup>81</sup> The court believed that the attorney receives reasonable compensation for her work based on the primary lodestar calculation, without need for a risk multiplier.<sup>82</sup>

The *Bolar* district court next examined the assertion that because plaintiffs' counsel accepted the case on a contingency basis, he was entitled to a risk multiplier.<sup>83</sup> Based on its interpretation of *City of Burlington*, the court concluded that awarding a risk multiplier on account of contingency would provide counsel with a windfall because "the difficulty of the litigation is taken into account in the billable hours and fee rates used to calculate the lodestar figure."<sup>84</sup>

Third, the *Bolar* district court analyzed the plaintiffs' counsel's contention that even if the class prevailed, the class may have difficulty collecting the judgment.<sup>85</sup> The court rejected this argument based on the Supreme Court's decision in *Misouri v. Jenkins*,<sup>86</sup> which held that the risk of nonpayment is no basis for awarding a fee multiplier.<sup>87</sup>

Finally, as if still uncertain, the *Bolar* district court looked at Justice O'Connor's risk multiplier test<sup>88</sup> that a fee enhance-

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phy of applying tenets set forth in fee-shifting cases to the equitable fund context. *Bolar*, 800 F. Supp. at 1096.

80. *Bolar*, 800 F. Supp. at 1096. The *Bolar* court used the term "equitable fund," which is identical to a common fund, to describe the fund the class action suit created.

81. *Id.* Again, following the language of the Second Circuit, the court found that "[t]he underlying rationale for the doctrine is the belief that an attorney who creates a fund for the benefit of a class should receive *reasonable compensation* from the fund for his efforts." *Id.* (emphasis added) (citation omitted) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 222 (2d Cir. 1987) ("*Agent Orange I*"), *cert. denied*, 484 U.S. 926 (1987)).

82. *Id.*

83. *Id.* at 1097.

84. *Id.* The court concluded that because of this, enhancement of the contingency factor is unnecessary. *Id.*

85. *Id.*

86. 491 U.S. 274, 282 (1989). The *Jenkins* Court cited to its dicta in *Delaware Valley II*, 483 U.S. 711, 729-30 (1987), stating that a court could base fee enhancement on risk of nonpayment but not on delay. *Id.* Nowhere did the *Bolar* court make this distinction, nor does it appear the court considered an enhancement based on the delay that might occur in collecting a judgment.

87. *Bolar*, 800 F. Supp. at 1097.

88. This test was put forth by Justice O'Connor in her concurrence in *Delaware Valley II*, 483 U.S. at 733, and rejected by the Court in *City of Burlington v. Dague*, 112 S. Ct. 2638, 2642 (1992).

ment is appropriate if necessary to attract competent counsel.<sup>89</sup> Even under this position, which the *Bolar* court noted the Supreme Court had specifically rejected, the court concluded that a risk multiplier was still inappropriate because "[d]ozens of New York City's top firms vied for the opportunity to represent the instant class."<sup>90</sup> Consequently, as a result of these factors, the court rescinded its initial 1.6 risk multiplier, eliminating \$885,885.40 from the attorneys' fee award.<sup>91</sup>

### III. *IN RE BOLAR PHARMACEUTICAL CO.*: THE COURT'S UNWARRANTED LEAP

#### A. *BOLAR'S* FATAL FLAW: DISTINCTIONS BETWEEN FEE AWARDS UNDER FEE-SHIFTING STATUTES AND THE COMMON FUND DOCTRINE

Although the *Bolar* court recognized that fee awards under the fee-shifting statutes differ from fee awards under the common fund doctrine,<sup>92</sup> it ignored those differences in concluding that the overriding purpose of the fee-shifting statutes is identical to the purpose of the equitable fund doctrine.<sup>93</sup> The basic distinctions between the awarding of attorneys' fees under the common fund doctrine and fee-shifting statutes are the underlying purpose of each award, which party ultimately bears the burden of attorneys' fees, and the conflict of interest between the plaintiff and her attorney. These distinctions, overlooked in *Bolar*, make clear that while risk multipliers are inappropriate under fee-shifting statutes, they are suitable under the common fund doctrine.

#### 1. The Underlying Purpose of Each Award: Risk Multipliers, Equity, and Congressional Intent

Although attorneys' fee awards under the common fund doctrine and fee-shifting statutes are similar in that in both

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89. *Bolar*, 800 F. Supp. at 1097.

90. *Id.*

91. The court initially granted a primary lodestar of \$1,465,809.00 and a risk enhancement of \$885,885.40, for an original fee award of \$2,351,694.40. *Id.* at 1092. After the *Bolar* court reevaluated its position, the fee award was reduced to \$1,465,809.00. *Id.*

92. See *Bolar*, 800 F. Supp. at 1096, n.7 (noting that "[s]ome courts have decided that the different rationales behind the [common] fund doctrine and statutory fee-shift[ing] preclude application of statutory fee-shift cases to equitable fund scenarios").

93. See *id.* (recognizing that "[a]lthough these arguments have some merit, the overriding purpose [of the two scenarios] is identical").

instances, attorneys' fees are contingent upon a successful resolution of the case, the court's authority to award fees and the underlying purpose of each award differs materially.

The award of fees under the common fund doctrine rests on the equity power of courts and is analogous to an action in quantum meruit.<sup>94</sup> Under the common fund doctrine, the attorney's efforts have conferred a benefit on the entire class. Accordingly, to prevent unjust enrichment of the absent plaintiffs, the common fund doctrine requires that courts award attorneys' fees directly from the fund to distribute uniformly the costs of the litigation among the class members. Statutory fee-shifting provisions, in contrast, reflect Congress's intent "to encourage private enforcement of the statutory substantive rights, be they economic or noneconomic, through the judicial process."<sup>95</sup> The fee-shifting statutes encourage "private enforcement" by awarding the prevailing party attorneys' fees from the defendant for violation of a statutory or constitutional right.<sup>96</sup>

Similarly, awarding risk enhancements under fee-shifting statutes contradicts the express intent of Congress to award fees only to the prevailing parties.<sup>97</sup> A basic premise of the risk multiplier is to compensate for the chance of nonrecovery. Attorneys who operate on a contingency-fee basis pool the risks of their various cases so that successful cases, in effect, pay for the time spent on those cases that produce no fee.<sup>98</sup> Hence, awarding risk multipliers in statutory cases rewards attorneys for those suits in which they failed to prevail, directly thwarts congressional intent, and makes risk multipliers inappropriate in

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94. See *Lindy I*, 487 F.2d 161, 165 (3d Cir. 1973). The *Lindy I* court drew the quantum meruit analogy and stated that "the individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed." *Id.*; see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975); *Skelton v. General Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989).

95. *Skelton*, 860 F.2d at 253 (quoting Third Circuit Task Force, *supra* note 11, at 247).

96. See *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988) ("statutory fees are intended to further a legislative purpose by punishing the nonprevailing party and encouraging private parties to enforce substantive rights"). See generally NEWBERG, *supra* note 35, § 2.06; Third Circuit Task Force, *supra* note 11, at 250-51 (outlining differences between statutory fee cases and common fund cases).

97. S. REP. NO. 1011, *supra* note 26, at 1, *reprinted in* 1976 U.S.C.A.A.N. at 5909.

98. See *City of Burlington v. Dague*, 112 S. Ct. 2638, 2643 (1992).

the fee-shifting cases.<sup>99</sup> By contrast, because the common fund doctrine is judicially, rather than legislatively created, courts are not statutorily prohibited from subsidizing unsuccessful suits with risk multipliers.

## 2. The Burden of the Attorneys' Fees

Another significant difference between the common fund and statutory fee-shifting contexts stems from who ultimately bears the burden of compensating the attorneys. Under the common fund doctrine, the court assesses attorneys' fees directly from the fund, decreasing the size of the plaintiffs' ultimate award. The burden of paying the attorneys' fees thus falls on the plaintiffs' class, rather than on the defendant's, because the deposit of the settlement fund with the court limits the defendant's liability.<sup>100</sup> By contrast, fee-shifting statutes place the burden of paying attorneys' fees on the defendant. Consequently, fee-shifting statutes are intrinsically punitive.<sup>101</sup>

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99. See *supra* note 60 (explaining why a risk multiplier in statutory fee cases is contrary to congressional intent); see also *Delaware Valley II*, 483 U.S. 711, 719 (1987); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984); Leubsdorf, *supra* note 4, at 490.

100. See *Skelton v. General Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). The *Skelton* court likened this fee payment process to the way a plaintiff's attorney is paid in a contingent fee arrangement. In both cases, plaintiffs must share their recovery with the attorney. *Id.* Under the common fund doctrine, however, the court and not a private agreement control the distribution of reasonable fees. See also *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) (stressing that in a class action suit, the judge, not the relevant market, must dictate the attorney's compensation).

101. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988). Because the risk multiplier reflects the percentage of the likelihood of non-recovery at the time the attorney accepted the suit, see *Lindy II*, 540 F.2d 102, 117 (3d Cir. 1976), assessing a risk multiplier in statutory fee cases penalizes the defendant for having a stronger case, because the stronger his case, the greater the risk that the plaintiff will not prevail, and the higher the risk multiplier. If the plaintiff's chance of prevailing in a civil rights lawsuit is 25%, the defendant's chance of losing is 25%. If the plaintiff prevails and the court awards a risk multiplier to reflect the 75% risk of not prevailing, the defendant pays more than if he would have had a greater chance of losing at the time the attorney accepted the suit. This anomaly could result in the defendant not zealously litigating his defense, fearing the added penalty incumbent with a stronger case. See, e.g., *Skelton*, 860 F.2d at 253 (expressing concern that awarding risk multipliers in statutory fee cases may inequitably burden defendants by penalizing those with the strongest defenses); see also *Delaware Valley II*, 483 U.S. 711, 719 (1987) ("[T]he contingency factor [in fee-shifting statutes] penalizes the losing parties with the strongest and most reasonable defenses, thus 'creating a perverse penalty for those least culpable.'" (quoting *Laffey v. Northwest Airlines*, 746 F.2d 4, 26

### 3. A Conflict of Interest

A third difference between the common fund and statutory fee-shifting contexts which the *Bolar* court failed to recognize pertains to the conflict of interest between the plaintiff's attorney and the plaintiff in statutory fee cases.<sup>102</sup> The award of a risk multiplier reflects the risk of not prevailing at the time the attorney accepted the suit; in a statutory fee case, the defendant reimburses the prevailing plaintiff's attorney's fees. Consequently, awarding risk multipliers may create a conflict of interest because the plaintiff's attorney must reveal the weaknesses of her case relative to the strengths of the defendant's to receive a higher multiplier.<sup>103</sup> This conflict is most prevalent when the court awards attorneys' fees prior to the final disposition of the case, or when one of the parties appeals the merits of the case. In these instances, stressing the weaknesses of the client's case for the sake of a greater multiplier may adversely affect the client's interests.

Under the common fund doctrine, the potential for such conflict does not exist. The plaintiffs' attorney first creates the fund, then petitions the court for her fees. Hence, at all times prior to settlement, the attorney zealously advocates her clients' case and any potential conflict between the attorney and the class is ameliorated when the judge assumes the fiduciary

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(D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), *overruled by* *Save Our Cumberland, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc)); Leubsdorf, *supra* note 4, at 488-89.

This argument against risk multipliers in statutory cases does not apply with equal force to the common fund doctrine. Applying a risk multiplier in a common fund case will not penalize the defendant since the defendant's liability terminates upon deposit of the settlement fund with the court. *See* 2 NEWBERG, *supra* note 3, § 11.11; *see also Skelton*, 860 F.2d at 254 n.1 (finding that in common fund cases, "defendants' potential liability has been limited").

Although the language of the fee-shifting statutes could arguably be read to award fees to "prevailing" defendants, fees have generally been awarded only to prevailing plaintiffs. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1074 (1984) (noting that the Supreme Court has read The Civil Rights Attorney's Fees Awards Act to mean that prevailing plaintiffs, and not prevailing defendants, are entitled to recover attorneys' fees).

102. *See* Third Circuit Task Force, *supra* note 11, at 251.

103. The attorney receives a higher multiplier when the risk of not prevailing is greatest. Thus, there is an incentive to downplay the strength of one's own case in order to appear to have a weaker case. *See e.g.*, Cavanagh, *supra* note 40, at 91; James D. Kole, Comment, *Nonpayment Risk Multipliers: Incentives or Windfalls?*, 53 U. CHI. L. REV. 1074, 1076-77 (1986) (noting that the lodestar system awards fees inversely proportional to the probability of success).

role for the class.<sup>104</sup> Unlike the fee-shifting case where the fees may be awarded prior to a final judgment, in the common fund case the risk multiplier is separate from the creation of the settlement fund, and becomes relevant only after the parties have fully litigated the merits of the case.

B. DEVALUING LEGAL SERVICES: RAMIFICATIONS OF THE *BOLAR* COURT'S EXTENSION.

1. Distorting the Fair Market Value of Attorney Services

Not only did the *Bolar* court fail to recognize the differences between the awarding of attorneys' fees under the common fund doctrine and fee-shifting statutes, but by extending Supreme Court doctrine to eliminate risk multipliers in common fund cases,<sup>105</sup> the *Bolar* court also distorted the underlying premise of the lodestar analysis. When the Third Circuit first developed the lodestar equation in 1973, it found that the purpose of the fee award is "to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant."<sup>106</sup>

The *Bolar* court erroneously found, however, that applying *City of Burlington's* limitation of risk multipliers in statutory fee cases to equitable fund cases did not defeat the purpose of the equitable fund doctrine. Specifically, the court incorrectly reasoned that the lodestar calculation without a risk multiplier

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104. When the attorney petitions the court for her fees under the common fund doctrine, she changes her role from that as a fiduciary of the class to a claimant against the fund she created. See Third Circuit Task Force, *supra* note 11, at 251. Unlike the fee shifting context, which retains its adversarial nature to the end, once the defendant deposits the settlement fund with the court in a common fund case, he has little interest or involvement in the disposition of the fund. See *In re Continental Ill.*, 962 F.2d at 573 (noting that because "defendants were out of the case by virtue of their settlement . . . they had no incentive to oppose the request for fees"). Thus, the court must assume the fiduciary role because it now has the responsibility of disbursing the common fund to those supposed to benefit from it. Third Circuit Task Force, *supra* note 11, at 251.

105. See *Bolar*, 800 F. Supp. at 1095.

106. *Lindy I*, 487 F.2d 161, 167 (3d Cir. 1973). See, e.g., *In re Continental Ill.*, 962 F.2d at 572; see also MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES § 16.04 (1992) ("[A]ttorneys in the marketplace properly expect greater compensation for a case in which the fee is contingent on success than for a comparable case in which the fee is guaranteed.") (footnotes omitted). But cf. *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 690 (N.D. Cal. 1990), *modified*, 132 F.R.D. 639 (1991) (advocating competitive bidding for position as class counsel). This is akin to the class selling its claim on the open attorney market.

ensures that class counsel will receive reasonable compensation.<sup>107</sup> Had the court examined the underlying purpose of the lodestar method, it would have recognized that in a contingent case, the primary lodestar figure standing alone does not confer the *reasonable value* of the attorney's services because it does not confer the *fair market value* of these services,<sup>108</sup> unless it compensates the attorney for the risk of not receiving any fee.<sup>109</sup> Rather, to reflect accurately the fair market value, the *Bolar* court should have awarded a risk multiplier to account for the contingent nature of the case.<sup>110</sup>

In the open market, attorneys who accept contingency cases expect greater compensation than for cases where the fee is guaranteed.<sup>111</sup> To accurately reflect the market value of the attorney's services, therefore, the court would need to multiply the primary lodestar figure by a risk multiplier to compensate the attorney for the chance of losing, thus accounting for the contingency factor.

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107. *Bolar*, 800 F. Supp. at 1094.

108. See DERFNER & WOLF, *supra* note 106, § 16.04 ("Because a court awarded attorney fee should replicate the fee obtainable in the marketplace as closely as possible, the factor of contingency of payment . . . must be reflected in the overall fee award in order to make the fee reasonable.") (footnotes omitted). It should be noted, however, that attempting to replicate the market value of attorney services through the lodestar calculation is a difficult endeavor because contingent fee arrangements usually are based on a percentage of the dollar recovery. See Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 471 & n.229.

109. While it is true that the same could be said for the lodestar calculation under the fee-shifting statutes, Congress, through the language of the Fees Act, and the Supreme Court, through its interpretation of congressional intent in *City of Burlington*, have eliminated risk multipliers based on the contingency factor.

110. In a typical class action, it is not feasible to expect a true market determination of a reasonable fee, because no individual class member has a large enough interest in the litigation to negotiate a market fee with the attorney. Consequently, in this situation, judges must simulate the market. See *In re Continental Ill.*, 962 F.2d at 572 (explaining this phenomenon).

The fair market value concept is best illustrated by an example (based on a similar example by Judge Posner in *In re Continental Ill.*, 962 F.2d at 569). Suppose an attorney's normal billing rate is \$300 per hour. If she routinely accepts class action cases with only a 75% chance of success on a contingency basis, simply taking her normal billing rate multiplied by the hours expended on the case will not replicate her true value on the open market because she will, in theory, only get paid in three out of every four cases. See DERFNER & WOLF, *supra* note 106, § 16.04.

111. See DERFNER & WOLF, *supra* note 106, § 16.04.

## 2. Post-*Bolar*: Unacceptable Options for Courts

The *Bolar* court not only distorts the fair market value of the attorney's services by eliminating the risk multiplier from fee determinations, but also leaves courts attempting to determine a reasonable fee under the lodestar method with an unacceptable alternative.<sup>112</sup> This alternative fails to account accurately for the reasonable value of the benefit conferred by the attorney upon the class, or for the fair market value of the attorney's time. Hence, if courts relied only on the primary lodestar calculation without the benefit of a risk multiplier, they would face significant problems.

Applying a straight hours-based formula, judges would be less able to give attorneys accurate compensation for the benefit conferred on the class. If attorneys negotiate a settlement

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112. Notwithstanding *Bolar*, courts usually award fees using the lodestar with enhancements method, the percentage of recovery method, or a combination of the two where the court calculates the lodestar and compares it as a percentage of the total fund or vice versa. Compare *Weinberger v. Great N. Nekoosa Corp.*, 801 F. Supp. 804, 811-12 (D. Me. 1992) (calculated fees using the lodestar method) with *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 736 F. Supp. 1007, 1016 (E.D. Mo. 1990) (choosing percentage of recovery method) and *In re Workers' Compensation Ins. Antitrust Litig.*, 771 F. Supp. 284, 287 & n.9 (D. Minn. 1991) (using percentage of recovery method but checking the award total against the enhanced lodestar calculation).

The hybrid method used in *In re Workers' Compensation Insurance* becomes virtually useless because, according to *Bolar*, the primary lodestar should not be adjusted. *In re Bolar Pharmaceutical Co. Sec. Litig.*, 800 F. Supp. at 1097. This hybrid method differs from the approach taken by the Supreme Court in the 1980s, whereby the Court calculated the primary lodestar and then enhanced that figure based on the *Johnson* factors.

After *Bolar*, courts may determine fees using the percentage of recovery method. The *Lindy I* court criticized the percentage of recovery method because it produced arbitrary fee awards and failed to account accurately for attorneys' efforts. The problems inherent in the percentage of recovery method still exist today. Percentage awards remain random and judges rarely include detailed reasons for the percentage chosen. See, e.g., *In re Chrysler Motors Corp.*, 736 F. Supp. at 1016 (granting an award of 17.5% of the fund and stating that "[t]his percentage is well within the normal range of fees when considered in terms of the relative size of the fund"); see also *supra* note 35 (describing the range of fee awards under the percentage of recovery method). For an excellent analysis of the problems inherent with the percentage of recovery method, see Macey & Miller, *supra* note 40, at 23-24. Yet, as the *Bolar* decision illustrates, inconsistent lodestar jurisprudence leads to a renaissance of the percentage method with more and more courts returning to some form of the percentage method in common fund cases. See *In re Chrysler Motors Corp.*, 736 F. Supp. at 1013 (listing cases applying a new hybrid of the percentage of recovery method); see also Lapointe, *supra* note 36, at 863 ("[C]ourts that had become frustrated with the vagaries of the lodestar method abandoned it entirely and instead adopted the percentage-of-recovery approach to common fund fee awards.").



fairly early in the case, for example, the benefit conferred on the class may be substantial but the compensation under the lodestar will be relatively small.<sup>113</sup> Conversely, if the attorney works numerous hours but only confers a small benefit to the class, a rigid application of the lodestar analysis would disproportionately reward the attorney and contravene the common fund doctrine's premise of avoiding unjust enrichment.

Additionally, sole reliance on the primary lodestar calculation provides little incentive for attorneys to accept contingent fee common fund cases. Attorneys would probably not take common fund cases over a cases where the client paid the same hourly-rate fee regardless of the outcome. Although the *Bolar* court noted that "[d]ozens of New York City's top law firms vied for the opportunity" to represent the plaintiff class,<sup>114</sup> the finding actually supports the appropriateness of granting a risk multiplier. The number of attorneys willing to accept a case directly relates to their market expectations, including the expectation of a risk multiplier.<sup>115</sup> If the risk multiplier accurately reflects the fair market value of the litigation, attorneys will willingly accept the case. Without a risk multiplier, however, market forces would prevent most lawyers from accepting contingent class action law suits. Hence, the *Bolar* court's reliance on the primary lodestar not only compensates the attorney for less than her market value, but also reduces the number of potential future plaintiffs by eliminating attorneys' incentive to accept contingent class actions.

Attorneys who receive an enhanced fee for contingent work do not receive a windfall on top of a reasonable fee.<sup>116</sup>

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113. If, for example, attorneys quickly generated a settlement fund of \$30,000,000 and only received a lodestar fee of \$30,000, they would receive only 0.1% of the total fund. By contrast, if the attorneys only generated a fund of \$50,000 but received a lodestar fee \$30,000, they would receive 60% of the fund. In the former scenario, the class members receive a windfall; in the latter situation, the attorney receives a windfall. Actual unjust enrichment also depends on other factors such as the number of people benefitted by the class. On this point, see, for example, *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

114. *In re Bolar Pharmaceutical Co. Sec. Litig.*, 800 F. Supp 1091, 1097 (E.D.N.Y. 1992).

115. Macey & Miller, *supra* note 40, at 53 (noting that "some trial courts conclude that if a particular case attracted numerous attorneys, the case could not have been particularly risky," and pointing out the fallacy of this conclusion because "the number of attorneys in a case is a function of their reasonable expectations—including their expectations of obtaining a risk multiplier if the suit is successful").

116. NEWBERG, *supra* note 35, § 1.08; see also DERFNER & WOLF, *supra* note 106, § 16.04(4)(a).

Rather, they receive what the market would pay them according to an hourly rate regardless of outcome. In the contingent context, attorneys bear the risk of loss by investing time, effort, opportunity costs, and the present value of compensation with no guarantee of receiving payment promptly or at all.<sup>117</sup> The client ultimately benefits from a system which creates an incentive for attorneys to take cases under the contingency model. Without the incentive, the client would be effectively shut out of the judicial process and would lose an opportunity to enjoy the benefit of the class action.

With some minor reform, the primary lodestar method, coupled with risk multipliers and settlement incentives, could align attorneys' fee determinations with the lodestar's basic purpose: reasonably to compensate attorneys for the benefit they have conferred on the absent claimants.

#### C. GETTING BACK TO BASICS: REFORMATION OF THE LODESTAR WITH ITS UNDERLYING PURPOSE IN MIND

The *Bolar* decision further complicated the already confusing question of how to award reasonable attorneys' fees in the common fund context. Due to inconsistent application of the lodestar and accompanying enhancements, courts are looking elsewhere for guidance in determining reasonable fees.<sup>118</sup> Properly applied, risk multipliers and multipliers used to reward early settlement can return the lodestar method once again to the forefront of fee award determinations.<sup>119</sup>

##### 1. Communication and Pre-Determination: The Key to Less Conflict in Assessing the Risk

All of the parties involved must communicate from the outset in order to determine properly the level of risk in a class

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117. See generally NEWBERG, *supra* note 35, § 1.08 (outlining the risks attorneys take in accepting contingent class action suits).

118. See, e.g., *In re Chrysler Motors Corp.*, 736 F. Supp. at 1015-16 (rejecting the lodestar calculation as unpredictable and awarding fees based on a percentage of the fund recovered).

119. To be truly effective, the risk multiplier must consider both the underlying reason for the lodestar method (to make fee awards more accountable upon scrutiny) and the underlying purpose of the method (to compensate the attorney for the reasonable value of services benefitting the unrepresented claimant). Proper use of the risk multiplier could address the concerns of commentators who criticize the lodestar method, and could make the calculation of a reasonable fee much less arduous. This would be accomplished by adhering to three key concepts of risk multipliers: communication and pre-determination, consistent risk multiplier awards, and settlement incentives.

action contingency suit. Commentators continually criticize the present risk multiplier assessment because its *ex post* judicial determinations of risk lack accuracy.<sup>120</sup> Although courts should look at the risk factor as of the time the attorney accepted the case,<sup>121</sup> the determination is difficult to make months or even years after the inception of the lawsuit. Pre-determination of the risk and communication of these findings between the class attorneys, the class, and the court, can substantially eliminate this problem by adhering to an *ex ante* determination of risk by the plaintiff's counsel.

Under this proposal,<sup>122</sup> when the named plaintiff first approaches the attorney, or more realistically, when the attorney seeks out the named plaintiff, the attorney would complete a risk assessment study in which she would examine the case for the possible risk factor. Factors to consider include comparison with similar cases,<sup>123</sup> the defendant's reaction to the potential suit,<sup>124</sup> possible criminal investigations occurring simultaneously with the proposed class action,<sup>125</sup> and any other relevant information such as the attorney's prior experience in this type

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120. See Macey & Miller, *supra* note 40, at 53 (noting possible hindsight bias with the use of the current *ex ante* perspective); see also Leubsdorf, *supra* note 4, at 487 ("One may question whether a judge should be called upon to look for the dust swept under the same rug on which he is standing."). Commentators also argue that assessing one risk multiplier at the beginning of the lawsuit fails to recognize the different levels of risk present throughout the lawsuit, suggesting that courts should assess different risk multipliers at different stages of the lawsuit. See Dobbs, *supra* note 108, at 470. The risk multiplier, however, is designed to compensate the attorney for the risk at the inception of the lawsuit. Adjusting the multiplier for each stage of the lawsuit distorts the risk the attorney bore to initiate the lawsuit in the first place.

121. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976) ("*Lindy II*").

122. This proposal simply suggests how better to use risk multipliers in common fund cases. A number of other commentators have also developed proposals for dealing with the problem of fee awards. See, e.g., Leubsdorf, *supra* note 4, at 511 (suggesting that the court should award a risk multiplier of two in all contingency cases); Miller & Macey, *supra* note 40, at 57-58 (suggesting the court appoint a special master to assess the fee under the lodestar method); Silver, *supra* note 40, at 901-07 (recommending that the parties determine the fee arrangement up front and that a "taxing magistrate" handle any disputes).

123. If a case is virtually identical to prior cases, the attorney can look at the success rates of the other cases to evaluate the risk with a reasonable degree of certainty. See *Lindy II*, 540 F.2d at 117 (listing factors that go into risk assessment.)

124. The situation in which the defendant zealously denies all allegations presents a greater risk that the plaintiff class will not prevail than the case in which defendant admits some wrongdoing at the beginning. See *id.*

125. If the government has taken the time to investigate possible wrongdo-

of case.<sup>126</sup> After completing the risk analysis, the attorney should inform the class members of the potential for risk in round percentiles (within five to ten percent)<sup>127</sup> through a direct mailing to the prospective class.<sup>128</sup>

After informing the class, the attorney should file her risk assessment, including detailed findings, with the court. If the lawsuit reaches settlement, the judge should examine the risk assessment and award the appropriate multiplier listed below. The attorney risk assessment would create the ceiling for the final risk determination by the court,<sup>129</sup> subject to downward adjustment if the judge perceives an abuse of discretion in inflating the risk factor. The threat of downward adjustment would give the attorney an incentive to determine the risk as accurately as possible.<sup>130</sup> If the judge deviates greatly from the attorney risk assessment, however, the judge would have to make specific findings and place them in the record to expedite the case should the parties appeal the fee award.

## 2. Consistency: The Key to Uniform Application of and Less Litigation Over Risk Multipliers

As explained above, absent a risk multiplier, attorneys who accept common fund cases on a contingency basis receive less than the fair market value of their services. Consequently, courts must award a risk multiplier in all contingency fee cases because the very nature of a contingent case precludes a one-hundred percent guarantee of successful settlement. One solution to the inconsistent application of risk multipliers is to apply the same risk multiplier for all risk within a specific range.

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ing, the likelihood that the defendant has violated the class members' rights is greater.

126. See *Lindy II*, 540 F.2d at 117.

127. This Comment selected round percentiles because of the inherent difficulty in calculating the exact percent chance of non-recovery. See DERFNER & WOLF, *supra* note 106, § 16.04(b)(i) ("Pinpointing the degree of risk is an inherently difficult task that poses substantial problems for all involved.")

128. See generally 2 NEWBERG, *supra* note 3, § 8 (detailing the process of notifying class members).

129. The attorney should assess the maximum risk involved because she has better information than the court and because she has the most at stake in assessing the risk. This would also eliminate the need for judges to raise the risk factor, thus theoretically streamlining the process.

130. Allowing the judge to lower the risk assessment for abuse of discretion greatly reduces the possibility that the attorneys will pad the risk assessment. Moreover, because the judge would not see the risk assessment until after the merits have been litigated, the process would avoid conflicts of interest between the attorney and the class.

This proposal would also eliminate a great deal of litigation by class members disgruntled over the size of the multiplier.

Under this proposal, cases would fall within one of five categories of risk multipliers:<sup>131</sup> those with a risk factor (i.e. the chance of not prevailing) less than fifteen percent, those with a risk factor between fifteen percent and thirty percent, those with a risk factor between thirty percent and sixty percent, those with a risk factor between sixty percent and eighty percent, and those with a risk factor greater than eighty percent.<sup>132</sup> For each category, the court assesses a fixed risk multiplier representing the approximate mean risk factor.<sup>133</sup> After assessing the appropriate risk multiplier and multiplying

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131. This proposal is somewhat analogous to Justice O'Connor's suggestion in *Delaware Valley II*, 483 U.S. 711, 732-33 (1987) (O'Connor, J., concurring in part, concurring in judgment). She proposed that courts treat all contingency as a class, awarding consistent fee determinations based on the way the relevant market treats contingent cases. *Id.* at 733. Justice Blackmun also adopted this line of reasoning in his opinion in *City of Burlington v. Dague*, 112 S. Ct. 2638, 2645-46 (1992) (Blackmun, J., dissenting). Although the majority of the Supreme Court rejected this proposal in *City of Burlington*, commentators have supported this class proposal for contingency cases. See, e.g., Leubsdorf, *supra*, note 4, at 501. Unfortunately, awarding a consistent risk multiplier would do little to provide attorneys with an incentive to accept those cases with a greater risk. If an attorney knows that she will get, for example, a 15% enhancement in a contingent case regardless of the actual risk involved, she should be reluctant to accept any cases with less than an 85% probability of success, and eager to accept cases with a greater than 85% probability of success. To create incentives for attorneys to accept cases and to reasonably compensate them for their fair market value, the risk multiplier must remain consistent with the actual risk involved.

132. One of the leading criticisms of risk multipliers is the presumption that the higher the multiplier, the greater the encouragement for attorneys to bring nonmeritorious suits. In *Laffey v. Northwest Airlines*, 746 F.2d 4, 26 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), *overruled by* *Save Our Cuberland, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc), the court gave the example that if a case had a two percent chance of success, the risk multiplier would be 50 ( $1/.02 = 50$ ). *Id.* Consequently, an attorney could bring 50 nonmeritorious suits, only prevail on one, and be even. The court reasoned that this would bog down the judiciary and choke off legitimate suits. *Id.* at 27. The argument miscalculates the situation for three reasons: First, regardless of the size of the multiplier, in order to get paid, the case must result in a common fund. Second, procedural mechanisms weed out nonmeritorious litigation. See, e.g. FED. R. CIV. P. 11 (providing for sanctions against lawyers who fail to act in good faith); FED. R. CIV. P. 12(b)(6) (motion for judgment on the pleadings for "failure of the pleading to state a claim upon which relief can be granted"). Third, the tremendous costs that the attorneys must bear in bringing those 49 unsuccessful suits would likely sink all but the most affluent law firms. In short, if the attorney succeeds in a case with a two percent chance of success, she should be compensated for the fair market value of her efforts.

133. The risk multipliers break down as follows:

it by the primary lodestar figure,<sup>134</sup> the trial court then compares the enhanced lodestar figure against its percentage of the total fund in order to assure that the fee award comports with the unjust enrichment principle on which the common fund doctrine rests.<sup>135</sup>

Consistent application of a fee award scheme such as the one proposed would make fee determinations more uniform and, consequently, leave less room for litigating the size of the fee award. Moreover, this proposal would eliminate criticism that judges often "shoot from the hip," when using the lodestar, creating confusion and uncertainty.<sup>136</sup>

### 3. Multipliers as Incentives: Encouraging Early Settlement

Courts could also use settlement multipliers as incentives to address other criticisms of the lodestar and to encourage attorneys to accept class action suits. A primary criticism leveled against the use of the lodestar is that attorneys often pad hours because the lodestar provides no incentive for an early resolution of the case. A system of settlement multipliers addresses this criticism and ultimately encourages attorneys to seek more readily early settlement if the best interest of the litigation calls for settlement.<sup>137</sup>

This proposal breaks the trial down into three stages: pre-

RISK FACTOR RANGE	RISK MULTIPLIER	BASED ON RISK % OF
1) 0 - 15% risk	1.17	15% (85% success)
2) 16 - 30% risk	1.33	25% (75% success)
3) 31 - 60% risk	1.82	45% (55% success)
4) 61 - 80% risk	3.33	70% (30% success)
5) > 81% risk	10.00	90% (10% success)

134. This is the lodestar figure developed by the Third Circuit in 1973.

135. Checking the result against the percentage of recovery guarantees that the award will be reasonable in light of the common fund doctrine, yet provides a more accurate picture of the effort expended by the attorney than the percentage method alone. If the enhanced lodestar amount greatly exceeds the percentage caps set forth below, the judge should reduce the award accordingly.

Under this proposal, the enhanced lodestar should not exceed the following percentages of the total fund:

SIZE OF FUND	PERCENTAGE OF ENHANCED LODESTAR
< \$1,000,000	not to exceed 35%
> \$1M but < \$10M	not to exceed 30%
> \$10,000,000	not to exceed 25%

These percentages reflect the court's usual notions of just enrichment under the common fund doctrine.

136. See Silver, *supra* note 40, at 950.

137. The settlement enhancements break down as follows:

discovery, post-discovery, and pre-trial. By awarding the appropriate multiplier for each stage at which the case is settled, courts will encourage plaintiffs' attorneys to seek this alternative and ultimately save valuable judicial resources.<sup>138</sup> Courts would add the settlement enhancement to the risk enhancement and arrive at the final fee determination. This proposal would give attorneys an incentive to settle without providing so great a windfall that it promotes improper settlements. Again, to remain consistent with the equity rationale of the common fund doctrine, the enhanced lodestar figure must remain consistent with the percentage caps listed above.<sup>139</sup>

### CONCLUSION

*In re Bolar Pharmaceutical Co.* found risk multipliers inappropriate in a common fund case, and thus improperly extended the Supreme Court's restriction on risk multipliers. In failing to recognize the purpose and effect of common fund fee awards and the fair market value of attorneys' services, the *Bo-*

TIME OF SETTLEMENT	AMOUNT OF ENHANCEMENT	MULTIPLIER
Pre-discovery	25% of primary lodestar	1.25
Post-discovery	15% of primary lodestar	1.15
On the eve of trial	10% of primary lodestar	1.10

138. It should be stressed that this proposal only encourages settlement if it is in the best interest of the class. Often, the class would be better served by an equitable remedy rather than a damage remedy. In these cases, the class attorney should forgo the lure of the settlement enhancement and concentrate on the interests of her clients.

For a cautionary work regarding settlement, see Fiss, *supra* note 101, at 1075, characterizing settlement as the "civil analogue of plea bargaining."

139. The facts of *Bolar* illustrate how this proposal would operate. The court found that the hourly rate for attorneys (\$300) and paralegals (\$60) multiplied by the total hours worked (7,846.3) resulted in a primary lodestar of \$1,469,809.00. See *supra* note 68. The *Bolar* court initially awarded a risk multiplier of 1.6, reflecting a 62.5% chance of success ( $1/RM = \% \text{ of success}$ ). Under this proposal, the court would award a risk multiplier of 3.33 (since the risk factor falls within the 61-80% range) for an enhanced lodestar of \$4,894,463.90. Because the case settled just prior to the completion of virtually all discovery, [Proposed] Findings of Fact, Conclusions of Law and Order With Respect to Award of Lodestar Multiplier to Plaintiffs' Counsel ¶ 14(e), *In re Bolar Pharmaceutical Co., Inc.*, Sec. Litig., 800 F. Supp. 1091 (E.D.N.Y. 1992) (No. 89 Civ. 1726) (on file with the *Minnesota Law Review*), the court would also award a settlement enhancement multiplier of 1.15. This would add \$220,471.35 ( $\$1,469,809.00 \times .15$ ) to the enhanced lodestar for a final fee award of \$5,114,935.20. This figure represents approximately 16.3% of the \$31,375,000.00 settlement fund. Because the fee award cannot exceed 25% of a fund of that size, the award of \$5,114,935.20 would be appropriate under this proposal.

*lar* court relied on a misguided and problematic rationale to prohibit a risk multiplier in the common fund context. Notwithstanding *Bolar*, courts should award risk multipliers in common fund actions and adopt a consistent approach to using the risk multiplier that will enhance its effectiveness, reduce the amount of litigation surrounding its use, and ultimately encourage a willingness on the part of attorneys to accept contingent fee common fund cases.



